90-267

Supreme Court, U.S.
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No. _____

UNITED STATES SUPREME COURT

October Term, 1990

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W. OTIS CULPEPPER,

Petitioner

- vs -

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY HOLDING THAT THE SPEEDY TRIAL ACT WAS TOLLED FOR PETITIONER BETWEEN JANUARY 13 AND APRIL 21, 1988, BY A TENDERED GUILTY PLEA OFFERED BY A DEFENDANT IN ANOTHER CASE WHO WAS A CO-DEFENDANT WITH PETITIONER IN THIS CASE?

II. DID THE COURT OF APPEALS ERR AND ABUSE ITS DISCRETION BY DENYING THE MOTION FOR ENLARGEMENT OF TIME ON MARCH 26, 1990, BY NOT FILING THE PETITION FOR REHEARING ON MARCH 29, 1990, AND BY DENYING THE PETITION TO RECONSIDER THE PETITION FOR REHEARING ON APRIL 26, 1990?

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## OFFICIAL REPORT

The decision of the Court of Appeals affirming Petitioner's conviction is reported at U.S. v Culpepper, 898 F2d 65 (6th Cir. 1990).

## JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on March 12, 1990, and its order respecting the rehearing petition on April 26, 1990. Jurisdiction is conferred on this Court to review the judgment and order in question by writ of certiorari pursuant to 28 USC section 1254(1).

## STATUTE INVOLVED

The case involves the Speedy Trial Act, 18 USC section 3161.

## STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals affirmed Petitioner's conviction on March 12, 1990. On March 26, 1990, Petitioner filed a Motion for Enlargement of Time to file Petition for Rehearing. On March 29, 1990 the Appeals Court advised Petitioner's counsel by phone that the Motion for Enlargement was to be denied, and later that day Petitioner hand filed a Petition for Rehearing.

The Appeals Court clerk returned the Rehearing Petition with a letter stating that "Sixth Circuit policy states that a petition for rehearing must be received within 14 days of the decision."

On April 6, 1990 Petitioner filed a Petition to Reconsider the Petition for Rehearing, indicating that it was filed within the provisions of FRAP 40 and 26(c). The Court, by Order of April 26, 1990, (See Appendix) denied the Petition to Reconsider Petition for Rehearing and

denial of the request for an extension of time to file the Rehearing Petition.

Petitioner herein requests review of the appellate court's denial of the Petition to Reconsider the Rehearing Petition and the denial of the Motion for Enlargement of Time per Rules 13.4 and 14.1(e)(ii). Petitioner requests that this Court either direct the Court of Appeals to docket the Petition for Rehearing for decision or review the merits of petitioner's appeal from the decision affirming his conviction on March 12, 1990.

This appeal concerns a misapplication by the lower courts of the provisions of the Speedy Trial Act that demands review and correction by this Court. The Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this Court." Rule 10.1(c).

The Court of Appeals ruled that the speedy trial time limitation in Petitioner's case was tolled after a guilty plea by a defendant in a separate proceeding who was also a co-defendant with Petitioner on one count of the indictment in this case. The ruling is contrary to the language of the Speedy Trial Act, specifically Section 3161(h)(1)(I), to wit:

> "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to -
>
> (I) Delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government. (Emphasis added).

The defendant on the proposed plea agreement was not the Petitioner, and the proposed plea agreement was not "other proceedings" concerning Petitioner.

"The" is a definitive article and "a" is an indefinite article. The language of the section by its restrictive word usage excludes rather than includes the effect of another person's plea agreement in a separate matter on a case wherein that person is a co-defendant with a defendant-petitioner. The Speedy Trial Act is not tolled against a defendant in one matter by a guilty plea by a person in a separate matter not involving defendant where that person is also a co-defendant in the case before the Court.

In this case, the defendant in Section (h)(1) is not the defendant in Section (h)(1)(I), so (I) does not come within (1), and the guilty plea in the

co-defendant's other proceeding did not toll the Petitioner's speedy trial rights in this proceeding. The speedy trial time clock was not stopped for Petitioner by the guilty plea of his co-defendant in a different case that did not involve Petitioner. Therefore, Petitioner was denied a speedy trial.

## ARGUMENT

I. THE COURT OF APPEALS ERRED BY HOLDING THAT THE SPEEDY TRIAL ACT WAS TOLLED FOR PETITIONER BY A TENDERED GUILTY PLEA OFFERED BY A DEFENDANT IN ANOTHER CASE WHO WAS ALSO A CO-DEFENDANT WITH PETITIONER IN THIS CASE.

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The Court held that "the 70-day speedy trial limitation imposed by the act was tolled between January 13 and April 21, 1988 when the Court accepted Jones' tendered guilty plea" (Opinion, p. 7).

Jones was a co-defendant in one count in Petitioner's case. Jones pled guilty on January 13, 1988 in a separate indictment in United States v. Jones, et al, (ED Mich No. 87-80648), which did not name or involve Petitioner. Jones plea was under advisement in the separate case until April 21, 1988.

Jones' plea agreement in the separate indictment provided that he would be dismissed from the one count in

petitioner's indictment, leaving petitioner to go to trial alone. Petitioner received no notice of the entry of the plea by Jones in the separate indictment.

Petitioner had no opportunity to be heard on or object to the period of excludable delay which the courts had began on January 13, 1988 and ran 91 days until Petitioner filed his Motion to Dismiss on April 14, 1988, per section 3162(a)(2). No order was entered in the instant case declaring that the co-defendant's plea in the other case terminated or initiated any period of excludable delay for Petitioner in this case.

The "ends of justice" exclusion entered by the trial court expired on February 1, 1988 and no notice or further order was entered.

When ultimately tried alone, Petitioner was acquitted on the single

count in the five-count indictment on which he was a co-defendant with Jones.

Section 3161(h)(1)(I) of the Speedy Trial Act reads as follows:

> "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to - -
>
> (I) Delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government. (emphasis added).

The court's opinion said that "existing precedent dictates that the time required by the trial court to consider a guilty plea tolls the accrual of the speedy trial clock. See United States v. Bowers, 834 F2d 607, 610 (6th Cir. 1987) (per curiam)."

The Bowers' case concerned a guilty plea that was late in being rejected by defense counsel. It was determined to be other proceedings concerning the defendant. The case is inapplicable in this case because the plea involved Mr. Jones who is not the petitioner herein.

The term "the defendant" in paragraph (1) matches the term "the defendant" in paragraph (I) of 18 USC 3161(h)(1)(I). The word the is a definitive article. Under the facts of this case the term "the defendant" in paragraph (1) could only refer to Petitioner. However, the term "the defendant" in paragraph (I) could only refer to co-defendant Jones.

Thus, in this case, the individual called "the defendant" in paragraph (1) was not "the defendant" in paragraph (I).

Thus, the delay occasioned by the consideration of a proposed guilty plea by Jones under paragraph (I) was not "delay resulting from other proceedings concerning" Petitioner, in paragraph (1) of 18 USC 3161(h).

The delay while Jones' guilty plea was under advisement per paragraph (I) did not relate to and could not constitute "other proceedings" concerning Petitioner as "the defendant" in paragraph (1) and should not have been used by the court in its analysis to toll the speedy trial clock in petitioner's case under 3161(h).

In drafting 18 USC 3161(h)(1)(I) Congress could have used different words to allow for application of the tolling exclusion to a co-defendant in the same or another case by using the phrases "a defendant" or "a defendant or a co-defendant."

The word "a" is an indefinite article. However, Congress chose to use "the defendant" throughout and therefore must be held to have meant "the defendant" to be the same person in paragraphs (1) and (I).

In United States v. Gallardo, 773 F2d 1496 (9th Cir. 1985) the court discussed the statutory language and congressional intent in word usage in construing "ends of justice" continuances under Section 3161(h)(8)(A). The court noted that Congress could have used different words in composing the Speedy Trial Act, "an extremely detailed, precisely drafted statutory scheme," but choose not to. So, Congress meant to say what the words say.

Gallardo is in accord with the principle that criminal statutes must be strictly construed in the favor of defendants. See Huddleston v. United States, 415 US 814, 94 S Ct 1262, 39 LEd

2d 782 (1974); United States v. Bass, 404 US 336, 92 S Ct 515, 30 LEd 2d 488 (1971).

The Court therefore "misapprehended" a point of law, specifically the misinterpretation of paragraphs (1) and (I) of Section 3161(h) in finding proceedings relating to a co-defendant as proceedings related to Petitioner. A rehearing was appropriate by the Court of Appeals under FRAP 40.

The court's opinion also stated that it was necessary to look to the intent of Congress when it enacted Section 3161(h)(7) to determine whether the delay attributed to a co-defendant was reasonable "within the context of all circumstances impacting the tendered plea." (Opinion, pp. 6-7). The Court then quoted from United States v. Monroe, 833 F2d 95, 100 (6th Cir. 1987) commenting on the "congressional preference for joint trials."

The court then concluded from Monroe, supra, that it was congressional intent that "delays attributable to the joinder of defendants be liberally excluded."

Here there was no joint trial. Once Jones tendered a guilty plea in a case involving a separate indictment, providing that he be dismissed from Petitioner's case, there was no prospect of a joint trial after January 13, 1988.

Therefore, the "congressional preference for joint trials" and liberal exclusion because of "joinder" did not apply to the delay in Petitioner's case.

Moreover, in United States v. Dennis, 737 F2d 617 (7th Cir. 1984), the court held that Section (h)(7) (delay due to proceedings involving co-defendants) exclusion applies to all co-defendants in the same case. No case has ever held, as did the court below, that the exclusion applies to co-defendants in other and

separate cases, without notice to the affected co-defendant or order of the court.

Therefore, co-defendants who should share exclusions are those in the same case. Petitioner was not in the case in which Jones tendered his guilty plea.

In United States v. Payden, 620 F Supp 1426 (DC NY 1985) the court quoted the "Guidelines to the Administration of the Speedy Trial Act of 1974," as amended, at 59 (Dec. 1979 Revision) as follows:

> ". . . if the joinder ends because of a guilty plea, severance or other reason, while the (h)(7) exclusion is running, the ending date of the excludable period will be the date on which the joinder ends." Payden, p. 1429. (Emphasis added.)

Therefore, the exclusion and joinder should have ended with the guilty plea by Jones on January 13, 1988 in the separate indictment and the agreement by the

Government to dismiss Jones as Petitioner's co-defendant.

Thus, the co-defendant exclusion under Section 3161(h)(7) did not apply under Monroe, supra, and the court "misapprehended" that point of law. See FRAP 40. But again, the plea in the other Jones' case was irrelevant to the Speedy Trial Act computations under Section 3161(h)(1)(I).

The court's opinion also noted that the "ends of justice" continuance effective from October 16, 1987 forward stopped Petitioner's speed trial clock under Section 3161(h)(8)(A). (Opinion, p. 5.)

The court, however, did not note in its opinion that the "ends of justice" continuance expired on February 1, 1988, and no formal extension of the continuance was entered.

Therefore, the October 16, 1987 "ends of justice" continuance did not

toll Petitioner's speedy trial clock after February 1, 1988, and the court "overlooked" this point of fact in its analysis of the case. (SEE FRAP 40).

Further, the court, as a result of overlooking the expiration date of the "ends of justice" continuance above, also overlooked the resulting point of law that Petitioner's speed trial time clock was not tolled from February 1, 1988 until April 14, 1988. The 74 days alone exceed the allowable time under the act.

Therefore, a rehearing in this case was in order because the omission of consideration of that point alone could have been outcome-determinative in Petitioner's favor.

The Court also stated that Petitioner "having failed to petition for severance cannot, at this late date, seek to evade the requirements of Section 3161(h)(7)." (Opinion, p. 4.) That section involves "delay when defendant is

joined for trial with a co-defendant." The Court somehow imputed knowledge of Jones' guilty plea on January 13, 1988 to Petitioner, even though that fact is nowhere contained in the record, and there was in fact no notice to Petitioner of Jones' plea in the separate indictment.

A motion for severance presupposes knowledge of a reason to sever. Even if Petitioner here had known of the co-defendant's plea in the other separate case, he would have no reason to move for severance inasmuch as the plea agreement called for the co-defendant to be dismissed from the indictment involving Petitioner. A motion to sever would have been superfluous under those facts.

Moreover, a defendant cannot passively waive his speedy trial rights without notice of the waiver. No duty is imposed on defendant to assert his rights

under 18 USC 3161. The imputation of knowledge and/or notice of Jones' guilty plea by Petitioner was another misapprehension of fact by the court. (See FRAP 40). Also, the equation of no motion for severance equaling waiver of speedy trial rights was a misapprehension of law by the court. (See FRAP 40).

The court's ruling violated the purpose of the Speedy Trial Act and would place any defendant with a co-defendant who has other pending charges in the position of having his trial needlessly delayed by the co-defendant's actions in the other case, where the affected defendant has no notice and no standing or opportunity to object.

These are issues of first impression and affect the rights of an increasing number of defendants because of the increase in multiple, simultaneous prosecutions of targeted individuals in multi-defendant indictments. The court's

ruling is especially ominous because, although the multiple indictments involving Petitioner and Jones in the instant case were all pending in the Eastern District of Michigan, there is no limiting language in the opinion and it could as easily be used to justify delaying a defendant's trial based on co-defendant's actions in separate federal districts.

The salutary purposes of the act certainly do not contemplate that a trial court can indefinitely stop the running of the speedy trial rights of all co-defendants in one indictment by virtue of the fact that one of the co-defendants has offered a plea of guilty in an unrelated indictment and that said plea is "under advisement." Such an exception would swallow the rule and make individual defendants absolutely subject to the whims, actions, and good faith of other parties in other proceedings.

The appeals court's opinion further misconstrued the record below by finding that the separate indictment involving Jones was "interrelated" (Opinion, p. 7) with the Petitioner's indictment. That finding directly contradicts the position taken by the Government below and accepted by the trial court. Petitioner repeatedly demanded that the Government come forward with some showing of "interrelationship" and the Government declined. The court's appellate judicial "fact-finding" was contrary to the record and should have at a minimum required a remand for a hearing on the question of "interrelationship," before such a finding can be a basis of this decision.

Further, some nebulous and unspecific "interrelationship" of indictments is not a legal basis under the Act for extinguishing the speedy trial rights of a defendant in one case based on the unknown and uncontrolled

actions of a co-defendant in another case.

Such situations are covered by the "ends of justice" exclusion found in 18 USC 3161(h)(8)(A). Notice, an opportunity for the defendant to be heard and a specific finding and order by the trial court are required before an "ends of justice" exclusion may be valid. None of these appropriate procedures were employed in this case. Again, this "misapprehension" and errors of law require consideration by this Court and reversal of Petitioner's conviction.

II. THE COURT OF APPEALS ERRED AND ABUSED ITS DISCRETION BY DENYING THE MOTION FOR ENLARGEMENT OF TIME ON MARCH 26, 1990, BY NOT FILING THE PETITION FOR REHEARING ON MARCH 29, 1990, AND BY DENYING THE PETITION TO RECONSIDER THE PETITION FOR REHEARING ON APRIL 26, 1990.

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Petitioner filed a Motion for Enlargement of Time to File Petition for Rehearing on March 26, 1990. See Appendix. On March 29, 1990 the clerk by phone advised that the Motion for Enlargement of Time was to be denied, and Petitioner hand filed the Petition for Rehearing (See Appendix) later that day.

The Rehearing Petition was returned by the clerk with a letter stating that "Sixth Circuit policy states that a petition for rehearing must be received within 14 days of the decision." See Appendix.

On April 6, 1990 Petitioner filed a Petition to Reconsider the Petition for Rehearing, (See Appendix) indicating that

the Petition for Rehearing was filed within the time limits of FRAP 40 and 26(c).

On April 26, 1990 the court denied the Petition to Reconsider Petition for Rehearing and the motion for extension of time to file the rehearing petition. See Appendix.

FRAP 40 states: "A petition for rehearing may be filed within 14 days after entry of judgment . . ." FRAP 26(c) states: "Whenever a party is permitted or required to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days shall be added to the prescribed period."

The judgement of the Court of Appeals of March 12, 1990 was served on Petitioner by mail. Therefore he had 17 days to file a petition for rehearing, and he did so on March 29, 1990. The

"local policy" used to reject the filing was inconsistent with FRAP 40 and 26(c).

FRAP 1(a) states: "These rules govern procedure in appeals to United States courts of appeal from the United States district courts . . ." The Notes of Advisory Committee on Appellate Rules included: "Rule 47 expressly authorized the courts of appeal to make rules of practice not inconsistent with these rules." (emphasis supplied.) Therefore FRAP 40 and 26(c) govern the filing time for a petition for rehearing from the judgment/opinion of the appeals court, and the Petition for Rehearing that was delivered on March 29, 1990 should have been filed.

The Motion for Enlargement of Time to File Petition for Rehearing was timely, had merit and should have been granted. See Appendix. The Petition to Reconsider Petition for Rehearing was expeditious, had merit (see Argument I)

and should have been granted. Therefore the court erred by denying the relief prayed for in the Motion and Petitions.

The denials were formalized in the Order of April 26, 1990, which was an "order respecting a rehearing" for purposes of a writ of certiorari under Rules 13.4 and 14.1(e)(ii). Petitioner requests that this Court direct the Court of Appeals to docket the Petition for Rehearing for ruling or reverse the conviction that was affirmed by the opinion of March 12, 1990 because of the speedy trial violation put forth in the Petition for Rehearing and restated in Argument I herein.

## APPENDIX

OPINION, U.S. v CULPEPPER, No. 88-1880, U.S. Court of Appeals, 6th Circuit. . . . . 1

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Text of U.S. v W. Otis Culpepper, No. 88-1880, U.S. Court of Appeals, Sixth Circuit, Argued August 1, 1989, Decided March 12, 1990.

Defendant was convicted in the United States District Court for the Eastern District of Michigan, Avern Cohn, J., of three counts of tax evasion, and he appealed. The Court of Appeals, Krupansky, Circuit Judge, held that defendant's right to speedy trial was not violated.

Affirmed.

Jeffrey Foran, Asst. U.S. Atty., Kathleen Moro Nesi, Asst. U.S. Atty. (argued), Office of the U.S. Atty., Detroit, Mich., for the U.S.

Hugh M. Davis, Jr. (argued), Detroit, Mich., for W. Otis Culpepper.

Before KRUPANSKY and RYAN, Circuit Judges; and WILHOIT, District Judge (Kentucky, sitting by designation).

KRUPANSKY, Circuit Judge

On July 21, 1987, a grand jury of the United States District Court for the Eastern District of Michigan returned a secret indictment charging W. Otis Culpepper (Culpepper) with one count of evading the payment of income taxes for the years 1978 and 1980, in violation of 26 U.S.C. 7201, three additional separate counts for failure to file and pay income taxes for the years 1981, 1982, and 1983, respectively, in violation of 26 U.S.C. 7201, and a fifth count charging him and a co-defendant, Milton David Jones (Jones), a purported member of a narcotics enterprise known as the Young Boys, Inc., with conspiring to defraud

the United States by concealing assets in violation of 18 U.S.C. 371.

On May 12, 1988, subsequent to a bench trial, the district court convicted Culpepper of counts 1, 3, and 4 of the indictment charging evasion of income taxes for the years 1978, 1980, 1982, and 1983. The trial court dismissed count 2 of the indictment charging the evasion of income taxes for the year 1981 and count 5 of the indictment charging a conspiracy, concluding that there was insufficient evidence to support those alleged offenses.

Culpepper, upon appellate review, seeks to vacate his convictions charging, inter alia, the infringement of his right to a speedy trial as mandated by the Speedy Trial Act (the Act), 18 U.S.C. §3161 et seq., which provides that "a defendant be tried within 70 days of the latest of either the filing of an indictment or information, or the first

appearance before a judge or magistrate." Henderson v United States, 476 U.S. 321, 322, 106 S.Ct. 1871, 1873, 90 L.ED.2d 299 (1986), accord United States v Monger, 879 F.2d 218 (6th Cir. 1989); United States v Crane, 776 F.2d 600 (6th Cir. 1985). 18 U.S.C. §3161(c)(1) provides:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

See also United States v Blackmon, 874 F.2d 378, 380 (6th Cir. 1989). If the 70-day deadline is not honored, "the district court must dismiss the indictment, either with or without prejudice." 18 U.S.C. 3162(a)(2); see also Monger, 879 F.2d at 220.

Absent excusable reprieves from the 70-day mandate of 18 U.S.C. §3161(c)(1), a timely trial of Culpepper should have commenced upon the expiration of 70 days from the date of his arraignment on August 30, 1987. His trial, however, did not begin until April 25, 1988, or 178 days beyond the 70-day limitation. Accordingly, confronting this appellate proceeding is a review of the reasons advanced for delaying his trial within the excludable tollings permitted by §3161 et seq. and the judicial pronouncements interpreting the pertinent section of the Act.

[1] Initially, appellant's arguments to the contrary, the Supreme Court teaches that absent a timely severance of a co-defendant from petitioner's trial:

> All defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant. See 18 U.S.C. §3161(h)(7). Once Bell was jointed with petitioners in the September 3 superseding indictment, their 70-day period was measured with respect to his.

Henderson v United States, 476 U.S. at 323 n. 2, 106 S.Ct. at 1873 n. 2 (1986); accord United States v Blackmon, 874 F.2d 378 (6th Cir. 1989); United States v Pelfrey 822 F.2d 628, 634 (6th Cir. 1987) (speedy trial clock commenced when the last codefendant was arraigned). Accordingly, applying the dictates of the

enunciated precedents, the 70-day limitation clock in the instant case did not begin to run on Culpepper's behalf until the arraignment of his co-defendant Jones on September 25, 1987. 18 U.S.C. §3161(h)(7).

[2] Where multiple defendants are charged in an indictment and no motion for severance has been granted, only one speedy trial clock governs the action. Section 3161(h)(7) provides:

> (7) A reasonable period of delay when defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.

18 U.S.C. §3161(h)(7); see also Henderson 476 U.S. at 323 n. 2, 106 S.Ct. at 1873 n. 2. "All defendants who are joined for trial generally fall within the speedy trial computation of the latest co-

defendant." United States v Blackmon, 874 F.2d 378, 380 (6th Cir. 1989). "The excludable delay of one co-defendant may be ascribed to all defendants." Blackmon, 874 F.2d at 380; see also United States v Monroe, 833 F.2d 95, 100 (6th Cir. 1987); United States v Pelfrey, 822 F.2d 628, 634 (6th Cir. 1987); United States v Holyfield, 802 F.2d 846, 847-48 (6th Cir. 1986), cert. denied, 479 U.S. 1090, 107 S.Ct. 1298, 94 L.Ed2d 154 (1987); United States v Papaleo, 853 F.2d 16, 20 (1st Cir. 1988). In the case at bar, Culpepper, having failed to petition for severance, cannot, at this late date, seek to evade the requirements of §3161(h)(7). Moreover, the six days beyond the 10-day travel limitation of 18 U.S.C. §3161(h)(1)(H) attributed to transporting Jones from Texas to Detroit for his arraignment on September 25, 1987, which appellant insists should be charged against the 70-day trial

injunction, is of no consequence to appellant since the time interval would not have impacted the ultimate calculation of his speedy trial limitation.

[3] On October 9, 1987, the trial court granted the October 6, 1987 motion of legal counsel for co-defendant Jones to withdraw as his counsel. The four-day interval was excludable pursuant to §3161(h)(1)(F) which provides that "delay[s] resulting from any pretrial motion[s], from the filing of the motion through the conclusion of the hearing on or other prompt disposition of, such motion." 18 U.S.C. §3161(h)(1)(F); accord Henderson, 476 U.S. at 326-27, 106 S.Ct. at 1874; Monger 879 F.2d at 220; United States v Felton, 811 F.2d 190, 195 (3rd Cir. 1987) (en banc) (subsection (F) excludes the period from the filing of the motion until the parties complete the submissions necessary for the court to

reach a decision); United States v Papaleo, 853 F.2d 16, 21 (1st Cir. 1988) ("both the date on which the motion is filed and the date on which the court disposes of the motion are part of this excludable period").

Pursuant to a pretrial on October 15, 1987, the trial judge entered an "ends of justice" continuance effective October 16, 1987, pursuant to 18 U.S.C. §3161(h)(8)(A), upon concluding that orderly judicial procedure required the disposition of a pivotal criminal trial styled United States v Jones, Crim. No. 87-80648 (E.D. Mich. 1988) (hereinafter Young Boys), involving the widespread distribution of narcotics by an organization known as Young Boys, Inc., which trial was anticipated to occur on or about February 1, 1987, in which Jones was a named defendant, before the three other inextricably related cases could

proceed to trial.[1] Culpepper's legal counsel agreed with the court's resolution and took no exception to the "ends of justice" continuance.

[4] Although Culpepper, on appeal, did not contest the October 16, 1987 order of continuance pursuant to the "ends of justice" exclusion, he has argued that, on January 13, 1988, when co-defendant Jones tendered a bargained guilty plea pursuant to Fed.R.Crim.P. 11,[2] the purpose of the "ends of justice" continuance was no longer valid;

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[1]The interrelated cases were: (1) United States v Jones, Crim. No. 87-80648 (E.D. Mich. 1988), (2) United States v Culpepper, Crim. No. 87-80543 (E.D. Mich. 1988), (3) United States v Jones, Crim. No. 87-90013 (E.D. Mich. 1988), and (4) United States v Jackson, Crim. No. 87-80542 (E.D. Mich. 1988).

[2]The guilty plea involved all three of the related cases in which Jones was named as a defendant. Case Nos. 87-80648, 87-90013, and 87-80543. The plea agreement provided that Jones would plead guilty in Case Nos. 87-80648 and 87-90013 and that the charges in Case No. 87-80543, the instant matter, would be dismissed.

consequently, the 70-day speedy trial clock should have been reactivated resulting in a 91-day impermissible delay in violation of the Act.[3] The Young Boys' narcotics trial was concluded on April 5, 1988 subsequent to which the trial court, on April 21, 1988, expeditiously evaluated and accepted the guilty plea tendered by Jones on January 13. Thereafter, the trial judge disposed of various Culpepper pending motions filed on April 14, 1988 and commenced appellant's trial on April 25, 1988.

Section 3161(h)(1)(I) provides:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in

---

[3]The 91 days elapsed from January 13, 1988 through April 14, 1988, when Culpepper filed various pretrial motions including a motion for a continuance. The pretrial motions tolled the speedy trial clock from April 14, 1988 until the commencement of the trial on April 25, 1988.

computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
>
> (I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government;

18 U.S.C. §3161(h)(1)(I). See United States v Bowers, 834 F.2d 607, 610 (6th Cir. 1987) (per curiam). Accordingly, existing precedent dictates that the time required by a trial court to consider a guilty plea tolls the accrual of the speedy trial clock.

To properly assess the appellant's argument that the 70-day speedy trial clock was reactivated by the plea

agreement tendered by Jones on January 13, 1988, this court is charged with evaluating the reasonableness of the delay within the context of all circumstances impacting the tendered plea. "In determining whether the delay attributable to a co-defendant is reasonable, courts 'are guided by the purpose Congress intended to serve when it enacted section 3161(h)(7).'" Monroe, 833 F.2d at 100 (quoting United States v Dennis, 737 F.2d 617, 621 (7th Cir.), cert. denied, 469 U.S. 868, 105 S.Ct. 215, 83 L.Ed.2d 145 (1984)).

> The legislative history of this section demonstrates a strong Congressional preference for joint trials and an intention that delays attributable to the joinder of defendants be liberally excluded. Further, the purpose of this section is to

> insure that the Speedy Trial Act does not alter the present rules governing severance of co-defendants by forcing the government to prosecute the defendants separately or be subject to a speedy trial dismissal motion. Congress thus explicitly recognized the utility of multi-defendant trials to effectuate the prompt efficient disposition of criminal justice feeling that the efficiency and economy of joint trials far outweighed the desirability of granting severance where the criterion was simply the passage of time.

Monroe, 833 F.2d at 100 (citations omitted); accord United States v Novak, 715 F.2d 810, 814 (3rd Cir. 1983), cert. denied, 465 U.S. 1030, 104 S.Ct. 1293, 79 L.Ed.2d 694 (1984). In considering the

complexities of the four interrelated cases confronting the trial court, together with the impact that the final disposition of the Young Boys' narcotic trial would have upon the remaining cases, the trial judge acted with perception and acumen in adopting and implementing a reasonable and orderly administration of the four cases demanding his expeditious disposition. Accordingly, the 70-day speedy trial limitation imposed by the Act was tolled between January 13 and April 21, 1988 when the court accepted Jones' tendered guilty plea. The limitation period was further abated until the commencement of appellant's trial on April 25, 1988, during which period the court considered and disposed of Culpepper's various pretrial motions which had been filed on April 14, 1988. 18 U.S.C. §3161(h)(1)(F).

To briefly summarize the calculation of the 70-day speedy trial limitation of the Act from a base of 248 days which lapsed between August 21, 1987, the date of appellant's arraignment, and the commencement of his trial on April 25, 1988, it is apparent that the 70-day limitation was tolled during the time intervals between:

1. August 21, 1987 and September 25, 1987, the respective arraignment dates of appellant and his co-defendant Jones for a total of 35 days; and

2. October 6, 1987 and October 9, 1987 during which period the court considered and disposed of a motion to withdraw as legal counsel filed by Jones' attorney for a total of four days; and

3. October 16, 1987 and January 13, 1988, the date of the guilty plea tendered by Jones which appellant

argues should have reactivated the 70-day limitation clock tolled by the trial court's "ends of justice" continuance entered on October 16, 1987, without objection from Culpepper's counsel for a total of 89 days; and

4. January 13, 1988 and April 21, 1988 the date on which the trial court approved and accepted the guilty plea tendered by Jones on January 13, 1988 for a total of 100 days; and

5. April 21, 1988 and the commencement of appellant's trial on April 25, 1988 during which period the trial court considered and disposed of various pretrial motions which had been filed by appellant on April 14, 1988 for an additional four days, for a grand total of 232 excludable days from the 248 days which intervened between appellant's arraignment and trial or the expiration of 16 nonexcludable days which were chargeable against the 70-day limitation.

Assuming arguendo, that the district court's "ends of justice" continuance to which appellant took no exception remained effective for its intended period, namely the final disposition of the Young Boys' trial which actually concluded on April 5, 1988, appellant fares no getter in advancing his speedy trial argument. The "ends of justice" continuance would have remained in effect until April 5, 1988 for a total of 173 days, which when added to the 12-day interval between April 14 and the commencement of appellant's trial on April 25, 1988 attributable to disposing of appellant's pending pretrial motions, for a total of 185 days, which when aggregated within the 39 days between September 27, 1987, the date of the Jones' arraignment, and October 16, 1987, the date of the "ends of justice" entry of continuance, resulting in a grand total of 224 days, or 24 non-excludable

days chargeable against the 70-day speedy trial mandate.

This court having considered Culpepper's remaining assignments of error concludes that they are without merit.

Accordingly, judgment of Culpepper's conviction is AFFIRMED.

Text of: Motion for Enlargement of Time to File Petition for Rehearing

U.S. v Culpepper, 6th Circuit, 88-1880

NOW COMES Defendant-Appellant W. Otis Culpepper, by and through his attorney, Hugh M. Davis, Jr., pursuant to FRAP 26 and FRAP 40 and moves this Honorable Court for an enlargement of 14 days from the present filing deadline of Thursday, March 29, 1990, and shows as follows:

1. That this Court entered an Opinion and Order denying his appeal on March 12, 1990 and that the ordinary time allowed for a Petition for Rehearing pursuant to the above rules would be Thursday, March 29, 1990.

2. Defendant-Appellant seeks a rehearing on the speedy trial aspect of his appeal inasmuch as the Court's

opinion failed to address specific arguments raised by him regarding the construction of the Act and made judicial determinations of fact which are not based on the record below and are contrary to the asserted positions of the parties below.

3. The effect of the Court's Opinion and Order herein is to allow a Defendant's speedy trial rights to be stayed indefinitely, without notice, hearing or order, if a judge in a separate and unrelated indictment takes under advisement the guilty plea of an individual who happens to be a co-defendant with the affected Defendant in the instant indictment.

4. The indeterminant suspension of the right to speedy trial pursuant to 18 USC 3161, based solely on the actions of a co-defendant in a separate indictment, without notice or hearing, is a serious violation of the provisions and

purpose of the Speedy Trial Act and diminishes the rights of all individuals who have a co-defendant with other pending charges.

5. Undersigned counsel is a sole practitioner and already had scheduled court appearances and/or depositions on 10 of the 13 business days allowed for the preparation for a Petition for Rehearing.

6. Some of the authority relied on by the Court in its Opinion and Order of March 12, 1990 is so recent that it has not appeared in the supplements in the law libraries ordinarily available to counsel.

7. Counsel has diligently pursued the preparation of the Petition and, inasmuch as Defendant is presently incarcerated, there is no prejudice to the Government or benefit to Defendant from any delay.

WHEREFORE, Defendant contends that the above represents good cause pursuant to FRAP 40 and that an extension of 14 days should be granted herein.

Signed: Hugh M. Davis, Jr.

Attorney for Defendant-Appellant

Dated: March 2__, 1990

Filed:

Text of: Order of March 29, 1990

U.S. v Culpepper, 6th Circuit, 88-1880

Upon consideration of the motion of the appellant for an extension to April 9, 1990 for filing a petition for rehearing,

It is ORDERED that the motion be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

Signed: Leonard Green/pj
Clerk of the Court

Filed: March 29, 1990

Text of: Letter from 6th Cir. Case Supervisor to Hugh M. Davis

U.S. v Culpepper, 6th Circuit, 88-1880

Dear Mr. Davis:

Under separate cover, you received a copy of the order denying your extension of time to file a Petition for Rehearing in subject appeal.

Sixth Circuit policy states that a Petition for Rehearing must be received for filing within fourteen days of the decision. The decision was entered March 12, 1990. The petition should have been received for filing by March 26, 1990. Therefore, the "Petition for Rehearing" received this date is returned unfiled.

Signed: Ernestine R. Tennyson

Dated: March 29, 1990

Text of: Petition to Reconsider Petition for Rehearing

U.S. v Culpepper, 6th Circuit, 88-1880

NOW COMES Defendant-Appellant W. Otis Culpepper, by and through his attorney, Hugh M. Davis, Jr., and hereby requests that this Court reconsider his Petition for Rehearing for the reasons set forth herein:

1. The Court issued its decision on March 12, 1990.

2. Defendant-Appellant timely filed a Motion for Enlargement of Time on March 26, 1990 before the expiration of the 14 days in which to file a Petition for Rehearing.

3. On March 29, 1990, the Court, by phone, indicated that the Petition for Enlargement of Time was denied. Therefore, Defendant-Appellant delivered

his Petition for Rehearing later that same day.

4. The Court returned the Petition for Rehearing and the Order denying the Motion for Enlargement of Time.

5. The Clerk's letter rejecting the filing indicated that the Petition for Rehearing was untimely under the policy of the 6th Circuit, however, no basis was set forth on which the policy can overrule the Federal Court Rules.

6. FRAP 40(a) provides that a Petition for Rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule.

7. FRAP 26(c) indicates that a party has 3 days in addition to the proscribed period for doing an act where service of a paper upon that party is made by mail.

8. The decision was served upon Defendant-Appellant's attorney by mail.

9. Therefore, the Petition for Rehearing was timely delivered to the Court under FRAP 40 and 26(c).

10. Defendant-Appellant's Petition for Rehearing is not frivolous or taken for purpose of delay, but points out significant misreading of statute, misconstruction of the law and erroneous findings of fact by appellate judicial fiat contrary to the record in the trial court. There are meritorious bases for rehearing and the proffered Petition is attached hereto as Appendix A.

11. That, therefore, if discretion were to be exercised in the matter, it dictates the allowing of the filing in the instant case.

WHEREFORE, Defendant-Appellant requests this Honorable Court submit the

Petition for Rehearing to the panel for decision.

Signed: Hugh M. Davis, Jr.

Attorney for Defendant-Appellant

Dated: April 6, 1990

Filed:

Text of: Order of April 26, 1990

U.S. v Culpepper, 6th Circuit, 88-1880

Upon consideration of the motion of the appellant to reconsider the March 29, 1990 order denying the motion to extend time for filing a petition for rehearing, to stay the mandate (additionally construed as a motion to recall the mandate) and to allow an extension for filing a petition for rehearing,

It is ORDERED that the motion be, and it hereby is, denied in all respects.

ENTERED BY ORDER OF THE COURT

Signed: Leonard Green/ps
Clerk of the Court

Filed: April 26, 1990

No. _____

UNITED STATES SUPREME COURT

October Term, 1990

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W. OTIS CULPEPPER,
Petitioner

- vs -

UNITED STATES OF AMERICA,
Respondent.

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APPEARANCE OF COUNSEL

Please enter my appearance for W. OTIS CULPEPPER, Petitioner herein. I certify that I am a member of the Bar of the United States Supreme Court.

LAWRENCE D. HOCHMAN
Attorney for Petitioner
3146 Penobscot Bldg.
Detroit, MI 48226
313-961-2255.

Date: June 25, 1990.

No. _____

UNITED STATES SUPREME COURT

October Term, 1990

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W. OTIS CULPEPPER,
Petitioner,

- vs -

UNITED STATES OF AMERICA,
Respondent.

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CERTIFICATE OF SERVICE

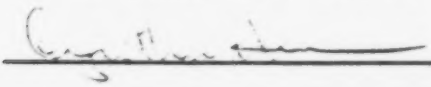
Lawrence D. Hochman served three copies of the Petition for Writ of Certiorari on the Solicitor General and upon the Assistant U.S. Attorney on June 25, 1990 by first class mail at the following addresses:

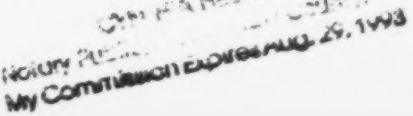
Unites States Attorney
817 Federal Bldg.
Detroit, MI 48226

Solicitor General
Department of Justice
Detroit, MI 48226
Washington, D.C. 20530

LAWRENCE D. HOCHMAN

Subscribed and sworn to before me on June 25, 1990.





No. _____

UNITED STATES SUPREME COURT

October Term, 1990

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W. OTIS CULPEPPER,
Petitioner,

- vs -

UNITED STATES OF AMERICA,
Respondent.

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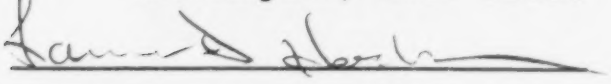
CERTIFICATE OF SERVICE

Lawrence D. Hochman served three copies of the revised Petition for Writ of Certiorari the Solicitor General and upon the Assistant U.S. Attorney on August 8, 1990 by first class mail at the following addresses:

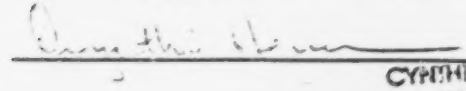
Unites States Attorney
817 Federal Bldg.
Detroit, MI 48226

Solicitor General
Department of Justice
Detroit, MI 48226
Washington, D.C. 20530



LAWRENCE D. HOCHMAN

Subscribed and sworn to before me on August 8, 1990.



CYNTHIA HELICAN
Notary Public, Washtenaw County, MI
My Commission Expires AUG. 29, 1993